

RICHARD SHELBY
Claimant

MCDONALD'S, INC.
Respondent
Self-Insured

KANSAS WORKERS COMPENSATION FUND

ORDER

APPEARANCES

RECORD AND STIPULATIONS

ISSUES

- (1) What is the liability of the Workers Compensation Fund, if any?
- (2) What, if any, credit is the Workers Compensation Fund entitled to for claimant's preexisting injury and resulting disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and having considered the briefs and arguments of the parties, the Appeals Board finds:

The Award of the Administrative Law Judge should be modified to assess 100 percent of the liability for the costs of the settlement and Award against the Workers Compensation Fund (hereinafter Fund).

The Award of the Administrative Law Judge sets out his findings of fact and conclusions of law in some detail and it is not necessary to repeat those herein. With the exception of the adjustment of credit given by the Administrative Law Judge for the preexisting impairment, the Appeals Board finds the findings and conclusions as enumerated in the Award to be accurate and appropriate and adopts same as its own findings and conclusions as if specifically set forth herein.

The Appeals Board finds that the settlement between claimant and the respondent did not compensate claimant for any preexisting disability. With that one exception, the Appeals Board otherwise adopts the analysis of the evidence of the Administrative Law Judge regarding the liability of the Fund. Specifically, the Appeals Board agrees with the finding that respondent met its burden of proof that it knowingly employed or retained a handicapped employee within the meaning of the statute and that the injury and resulting disability would not have occurred but for the preexisting physical impairment. See K.S.A. 44-567(a)(1).

The Fund argues that this case, at most, presents a case for apportionment of liability between the respondent and the Fund. Dr. Vito J. Carabetta gave an opinion that of the 20 percent whole body functional impairment rating, he would apportion 10 percent to the first injury and 10 percent to the second injury. Therefore, the Fund argues it should only be liable for, at most, one-half of the total disability awarded claimant by the terms of the settlement entered into between claimant and respondent. Furthermore, that the settlement, because it failed to take into consideration restrictions which were imposed upon claimant from the first accident, in effect compensated claimant for a work disability which included tasks which the claimant did not have the ability to perform at the time of his second accident, which is the subject of this docketed claim.

By the terms of the settlement, claimant was paid \$47,500 in one lump sum which equates to approximately a 38 percent permanent partial disability to the body as a whole. Dr. Carabetta apportioned 10 percent of his 20 percent functional impairment rating to the claimant's preexisting condition. Dr. P. Brent Koprivica, likewise, felt that claimant's preexisting impairment was 10 percent. As the functional impairment ratings of Dr. Carabetta and Dr. Koprivica were only 20 percent and 23 percent respectively, it is clear that the claimant was compensated for a work disability in excess of his functional impairment.

K.S.A. 44-501(c) provides in part:

"The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

The Administrative Law Judge determined that claimant sustained an 81 percent work disability as a result of the injury which is the subject of this claim, which would have entitled the claimant to an award of \$90,922.14, after deduction of the temporary total disability benefits paid. In this case, a 72 percent permanent partial disability would have entitled claimant to the maximum allowable benefits. The Administrative Law Judge further determined that the claimant's preexisting impairment had a value of \$12,989.50. He then made "a proportioned adjustment" by reducing the award against the Fund by \$12,989.50 divided by \$90,922.14 times \$47,500 or \$6,786.04.

Claimant received a settlement equivalent to a 38 percent permanent partial disability. Assuming, as did the Administrative Law Judge, that claimant was entitled to a 100 percent loss of ability to earn comparable wages and a 62 percent loss of ability to perform work tasks, for an 81 percent work disability; and that a 72 percent permanent partial disability award would have entitled claimant to the maximum benefit, there is a 34 percent difference between what was paid to claimant to settle his claim and the amount to which he would have been entitled if no settlement had been made. That 34 percent difference is more than adequate to account for any preexisting impairment under K.S.A. 44-501(c). Therefore, the Workers Compensation Fund should be liable for the entire amount of the settlement award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated December 6, 1995 should be, and hereby is, modified to require the Kansas Workers Compensation Fund to reimburse respondent for the full amount of the benefits and costs awarded claimant.

All other orders of the Administrative Law Judge contained in his December 6, 1995 Award and of Special Administrative Law Judge Ernest L. Johnson as set forth in the transcript of the July 24, 1995 Settlement Hearing are hereby adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. Kolich, Kansas City, KS
W. Fredrick Zimmerman, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director